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In The

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL.,

Petitioners,

vs.

ALPINE RIDGE GROUP, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEASED HOUSING ASSOCIATION AND OTHER ENTITIES AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES L. EDSON
Counsel of Record
KELLEY DRYE & WARREN
Attorney for National Leased Housing Association and Other Entities as Amici Curiae
2300 M Street, NW
Washington, DC 20037
(202) 955-9600

HARRY J. KELLY
RICHARD M. PRICE
Of Counsel

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No. 92-551

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF THE AMICI CURIAE

The amici curiae are (1) the National Leased Housing

Association and (2) 254 entities[1] who own and/or operate apartment projects and have entered into Housing Assistance Payments Contracts ("HAP Contracts") with the Department of Housing and Urban Development, pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437. The majority of Amici are appellants in an action pending before the United States Court of Appeals for the Federal Circuit, *National Leased Housing Association v. United States*, No. 92-5064 (appeal filed on March 27, 1992)[2] who seek to recover the unpaid portion of rent adjustments which, they contend, they are entitled to receive under the HAP Contracts. As explained in more detail in the following argument, the Amici have a vital interest in the outcome of the instant petition for writ of certiorari ("Petition"): Consideration of the validity of the Ninth Circuit's decision in *Alpine Ridge Group v. Kemp*, 955 F.2d 1382 (9th Cir. 1992) will undoubtedly involve analysis of a prior decision of the Ninth Circuit, *Rainier View Assocs. v. U.S. Department of Housing and Urban Development*, 848 F.2d 988 (9th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), which addressed the method by which HUD may calculate rent adjustments under the HAP Contracts. That analysis will directly effect the outcome of the NLHA Action, and several other actions pending elsewhere in the Federal courts. The Amici support the

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1. The amici curiae ("Amici") are listed individually in Appendix A to this brief.

2. The *National Leased Housing Association* case has been consolidated with several other actions, also pending in the Claims Court, which raise identical factual and legal issues. These actions include *Alturas del Senorial v. United States*, No. 204-88C (Claims Court), *Bramblewood, a Utah Limited Partnership v. United States*, No. 324-87C (Claims Court), and *Allison Village Assocs. v. United States*, No. 90-6C (Claims Court), all of which were consolidated with the NLHA Action. An additional action, *Athens Gardens Ltd v. United States*, No. 91-1181C (Claims Court), was filed in June 1991 and was stayed pending the outcome of the NLHA Action. For the sake of convenience, these cases will be referred to collectively as the "NLHA Action."

granting of the Petition, so that the Court can determine conclusively the validity of the *Rainier View* and *Alpine Ridge* decisions, and thereby establish a uniform national rule concerning the determination of rent adjustments under the HAP Contracts.

The Amici have obtained the consent of the Petitioner and the Respondents to the filing of this brief and have filed the consents with the Court.

SUMMARY OF THE ARGUMENT

Amici urge the Court to grant the instant Petition. The Petition seeks review of the Ninth Circuit's decision in *Alpine Ridge* which held unconstitutional Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 100-628, 103 Stat. 2057, ("HUD Reform Act"). Section 801 attempted, among other things, to reverse by statute the result reached by the Ninth Circuit in *Rainier View*, concerning the method by which HUD made rent adjustments under the HAP Contracts and to provide project owners with only 30 percent of the recovery that they would be entitled to receive under *Rainier View*. Amici wholly support the Ninth Circuit's opinions in *Rainier View* and *Alpine Ridge*. They urge the Court to grant the Petition, however, so that the Court may consider the validity of the *Rainier View* decision. A definitive statement by the Court of the validity of the Ninth Circuit's holding in *Rainier View* will finally establish a uniform national rule concerning the method for making rent adjustments under the HAP Contracts and put an end to an apparent dispute among the Federal courts concerning the method of making those rent adjustments.

ARGUMENT

The Amici, owners of apartment projects around the United States, entered into the HAP Contracts with HUD. The HAP

Contracts provide, *inter alia*, for payments from HUD (directly or though state agencies, in some cases) to the project owners, which payments subsidize the rents of qualifying tenants by paying the difference between what the tenants can afford and the market rent. The HAP Contracts provide a mechanism, termed the automatic annual adjustment factor ("AAAF"), to adjust the rental subsidy payments made to the project owners over the length of the HAP Contract. 24 C.F.R. 880.110 (1977). The Amici believe that *certiorari* should be granted here to resolve a long-standing dispute concerning the method by which rental adjustments are made under the HAP Contracts — the resolution of which may trigger a constitutional decision of great import.

The apparently simple AAAF-based mechanism for making periodic adjustments in the rents paid under the HAP Contracts has nevertheless generated enormous controversy. Beginning in about 1981, HUD began to abandon the AAAF-based rent adjustment mechanism in favor of project-by-project analyses of changes in comparable rents, which often resulted in rent adjustments far below the amount to which the project owners were entitled pursuant to the AAAFs. In response to this change in policy, project owners across the country challenged HUD in court over the use of project-by-project comparability studies.

In *Rainier View*, the Ninth Court held that, having initially chosen to employ the AAAFs to make market rent adjustments, HUD was not free to use comparability studies to make rent adjustments. The Ninth Circuit, in the instant case, *Alpine Ridge*, reaffirmed the *Rainier View* holding and went further to hold as unconstitutional Section 801 of the HUD Reform Act which allows the project owners to receive only 30 percent of the amount they would otherwise be entitled to receive under the AAAFs. The Amici strongly concur in the *Rainier View - Alpine Ridge* opinions for the reasons to be set forth by the Respondents in *Alpine Ridge* in their opposition to the petition for certiorari. Several courts,

including the Claims Court in the NLHA Action, however, have chosen not to follow the *Rainier View-Alpine Ridge* line. *NLHA Action*, 22 Cl. Ct. 649 (1991), *appeal pending*, No. 92-5064 (Fed. Cir.); *Carmichaels Arbors Assocs. v. United States*, 789 F. Supp. 683 (W.D. Pa. 1992), *appeal pending*, No. 92-3326 (3rd Cir.); *Sheridan Square Partnership v. United States*, 761 F. Supp. 783 (D. Colo. 1991). As a result of the profound disagreement among the courts in the circuits, project owners are subject to unacceptably unequal treatment.

The disparate interpretation of the courts in the circuits concerning the contract rights of project owners, such as Amici and others, to an AAAF-based rental adjustment, and their obligation to accept 30 cents on the dollar owed as reflected in Section 801, make it impossible for HUD to administer the Section 8 rent subsidy program uniformly throughout the country. This Court alone can resolve the fractious disagreement between the courts by producing a definitive interpretation of the HAP Contracts and the respective rights of the project owners and HUD.

This resolution can only occur, however, if the Court accepts certiorari to determine whether Section 801 is constitutional: The instant Petition, which challenges the *Alpine Ridge* Court's determination that Section 801 violates the Constitution, raises immediately the validity of the *Rainier View* holding also. As the government's brief acknowledges (Petitioner's Brief at 11-17), a necessary question in determining the constitutionality of section 801 is whether the project owners, as *Rainier View* held, are entitled by contract to a rent adjustment based solely on the AAAFs. Resolution of the issues raised in the instant petition therefore necessarily requires the Court to determine the validity of the *Rainier View* holding as to the project owners' underlying contract interest in rent adjustments based solely on the AAAFs. Thus, by accepting certiorari here, the Court will at last make possible a definitive interpretation of the HAP Contracts and

eliminate the real possibility of disparate treatment based on the location of their property.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant certiorari and affirm the decision of the Ninth Circuit in *Rainier View* and *Alpine Ridge*.

Dated: October 26, 1992

Respectfully submitted,

CHARLES L. EDSON
Counsel of Record
KELLEY DRYE & WARREN
Attorney for National Leased Housing Association and Other Entities as Amici Curiae
2300 M Street, NW
Washington, DC 20037
(202) 955-9600

HARRY J. KELLY
RICHARD M. PRICE
Of Counsel

APPENDIX A

Parties to the NLHA Action on Appeal

Alameda Terrace, Ltd.
Alturas de Senorial Associates
Ashbrooke Apts. Ltd.
Barbour County Apts., Ltd.
Beacon Hill Limited Partnership Community Management Corp.
Bellefontaine Gardens, Ltd. Bethesda Corp.
Birchwood Gardens, Ltd.
Bramblewood, A Utah Limited Partnership
Brandywood Acres Limited Partnership
Brent Gardens, Ltd.
Briarcliff Manor Limited Partnership
Brookside Hills Limited Partnership
Bulldogger Apartments
Burrell T. Davis
Cahaba Apartments, Ltd. Camden Way I, Ltd.
Camden Way II, Ltd.
Cedar Rapids Venture
Chaska Partners, Ltd.
Cheyenne Villa Limited Partnership
City Court II Apts., Ltd.
Colinas de San Juan Associates
Columbus Gardens, Ltd.
Cornelius, ALP
Countryside, A Utah Limited Partnership
Covadonga, LDP
Covington Apartments, Ltd.
Creekview Manor, Ltd.
Daleville Manor Co.
Damy-Franklin Realty Trust
Dana A. Patterson, Inc.

Appendix A

Dandridge Towers, Ltd.
Deerfield Apartments, Ltd.
Edward J. Roy Trust
El Verde Associates
Elk Associates
Elmwood Ltd.
Englewood Square, Ltd.
Englewood Village, Ltd.
Escalante III, WRP Limited Partnership
Eufaula Apartments, Ltd.
Fairfield Senior Citizens, Ltd.
Falls Meadowridge Ltd., Partnership
Farmington Court Associates Farrington, Ltd.
Forest Hill Limited Partnership
Forest Park South, Ltd.
Forest Park, Ltd.
Four Winds West Company
Gainesville Housing Authority
Gateway, ALP
Gray Hill Limited Partnership Community Management Corp.
Greenwood Apartments
Harriman Gardens, Ltd.
Heflin Apartments, Ltd.
Heritage House, A Utah Limited Partnership
Highland Manor, Ltd.
Highland Park Apts., A Texas General Partnership
Hillcrest Apartments Co.
Holly Haven I WRP Limited Partnership
Holly Haven II WRP Limited Partnership
Hollywood Fountain North, A California Limited Partnership
Hollywood Fountain South
I. L. O'Sullivan, Jr.
Ironman Apartments
Jardines De Caparra Associates

Appendix A

Jeffrey Place, Ltd.
Jellico Towers, Ltd.
Kensington Heights, Ltd.
Kimberly Associates
Kingsport Gardens, Ltd.
LaGrange Meadows Limited Partnership
Lansing Gardens, Ltd.
Lebanon Senior Citizens, Ltd.
Liberty Commons, Ltd.
Linden Park, Ltd.
Los Laureles Apts. LDP
Lyndonsville Associates
Lynwood Terrace Company
Marilyn Smith
Marion Manor II Ltd.
Marion Manor Ltd.
Maryville Towers, Ltd.
Memphis Towers, Ltd.
Montserrate Associates
Monte De Oro Associates
Morningside Gardens, Ltd.
Mt. Morgan Ltd.
Murfreesboro Towers, Ltd.
New Center Associates
Normandale Apartments, Ltd.
North Park Apartments, Ltd.
Northcrest, Ltd.
Northwood Park, Ltd.
Oakwood Apartments
Overbrooke Hills, Ltd.
Owensville Commons, Ltd.
Ozark Manor Co.
Pam Apartments Associates
Park Place Associates

Appendix A

Parkwood Apartments Partnership
Parkwood Apartments Partnership Phase II
Patten Towers, Ltd.
Peppertree Apts., Ltd.
Piqua Manor, Ltd.
Plaza Manor, A Limited Partnership
Prattwood Apartments Co.
Preston Drive Limited Partnership
Rainbow Apartments
Ramsay II Associates
Richard Roy
Rickwood, Ltd.
River Oaks Associates
Riverside Associates
Roosevelt Manor, Ltd.
San Anton Associates
Selma Apartments Co.
Socorro Village Apartments
South Park, Ltd.
Southeastern Partners, Inc.
Southern Development Co., of Andalusia, Ltd.
Southern Development Co. of Moulton, Ltd.
Southern Development Co., of Oneonta, Ltd.
Southern Development Co. of Oneonta No., 2, Ltd.
Southern Development Co. of Piedmont, Ltd.
Southern Development Co. of Sylacauga, Ltd.
Southwood Gardens, Ltd.
Spring Hill Limited Partnership Community Management Corp.
St. Charles, Ltd.
Stanley Square A Limited Partnership
Staunton Commons, II, Ltd.
Stone Hill Limited Partnership Community Management Corp.
Stonehedge II, A Utah Limited Partnership
Stonehedge, WRP Limited Partnership

Appendix A

Stonewood Apts. Ltd.
Streetsboro Green, an Ohio Limited Partnership
Summit Towers, Ltd.
Suncook Pond Associates
Sundance Apartments Associates
Sunset Square, Ltd.
Swansboro Hill Limited Partnership Community Mgmt. Corp.
Tamarind Square, Ltd.
Tanglewood Apartments, Ltd.
Tera Gardens, ALP
The Charlestown Group
The Heights, LDP
The Hillsborough Group
The Housing Authority of the City of Allentown Pennsylvania
The Sussex Group
The Watauga Company
Torre De Tokio Ltd., Div. Partnership
Troy Manor, Ltd.
Turabo Limited Dividend Partnership
Valley View Associates
Vandalia Associates, Ltd.
Vega Baja LDP
Victoria Arms Apartments, Ltd.
Villa Park, Ltd.
Village East Associates
Village II, WRP Limited Partnership
Village Park, Ltd.
WAD Company
Washington Gardens Association
West Columbia Apartments Associates
Western Gardens Associates a California Limited Partnership
Westgreen Limited Partnership
Westwood Arms, A Limited Partnership
Westwood Village Apartments, A Texas General Partnership

Appendix A

William Henry Waldock
Willow Creek, Ltd.
Willowood Investment A Utah Limited Partnership
Wilshire Apts., a Limited Partnership
Windwood II Company
Winhaven Associates
York Apartments Company

Parties to the NLHA Action who are Stayed in Claims Court Pending Appeal

National Leased Housing Association
ADA Associates
Baldwin Villa Plaza
Beechcreek Ltd. (The Southcreek Company)
Blackduck Apartments
Cambridge Square, Ltd.
Casa Linda Del Sur Associates
Clinton Towers Ltd.
Detroit Lakes Park Manor Estates Ltd. Partnership
El Nido Apartments
Elmwood Apartments Ltd.
Eminence Village, Ltd.
Floodwood Associates
Gatewood Village Apartments
Glenbrook Park, Ltd.
Greentree, Ltd.
Greentree Village
Henry Hill Apartments Ltd.
Hillside Terrace
Housing Associates of Lancaster
Hunt Building Corporation
Indian Ridge Ltd.
Jackson Valley Ltd.
Lintero Apartments

Appendix A

Madison Hill Limited Partnership
Maple Grove, Ltd.
Mill Ponds View Apts.
Montgomery Manor Apartments
North Star Apartments
Northgate Village Apartments
Peppertree Acres Apartments
Pine Hill Partnership
Pine Ridge Apartments
Prall Place, Ltd.
Princeton Apartments
Red Pines Estates
Regency Park, Ltd.
Regency Park of Louisville, Ltd.
Reynolda Woodlawn Apts.
River Bend Apts. Ltd.
Riverside Manor
Robinwood Park
Sagebrush Apartments
Southside Manor
Springview Partnership
Sunnyview Square
Sunset-Normandie Towers, Ltd.
Sycamore Terrace, Ltd.
The Maryland Ltd. Partnership
The Oaks
Thief River Falls Elderly
Walnut Hill Ltd.
Westwood Ltd.
Whittier Apts. Ltd.
Wildwood Apts. Ltd.
Williamsburg Terrace, Ltd.
Windsor Place Partnership, Ltd.
Woodside Park, Ltd.

Appendix A

Jose Antonio Escajeda Apartments
College Manor, Ltd.
Sierra Vista Apartments
Bremerton Limited
Burnsville Partners Ltd.
Central Towers Limited
Clifton Limited
Coventry Associates
Fridley Apartments
Heritage Hill II
Innsbruck Limited Partnership
Northgate Plaza Ltd.
The Hylands Limited
West Falls Estates
Windsor Place, Ltd.
Zumbrota Towers Limited
Park View Terrace Apartments
Mt. Carmel Housing Partnership
Allison Village Associates
Uptown Village, Ltd.
Village East Towers